

**BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD
OF THE STATE OF CALIFORNIA**

AB-7316a

File: 20-247117 Reg: 98043762

THE SOUTHLAND CORPORATION, PARDEEP PANNU,
and SUKHSAGAR PANNU dba 7-Eleven #18834
22808 Ventura Boulevard, Woodland Hills, CA 91364,
Appellants/Licensees

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Sonny Lo

Appeals Board Hearing: October 4, 2001 Redeliberation: February 7, 2002
Los Angeles, CA

ISSUED MAY 14, 2002

The Southland Corporation, Pardeep Pannu, and Sukhsagar Pannu, doing business as 7-Eleven #18834 (appellants), appeal from a decision of the Department of Alcoholic Beverage Control¹ which suspended their license for 25 days for their clerk, Ramesh Kosandra, having sold an alcoholic beverage to Christopher Jensen, a minor who was acting as a police decoy, the sale being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25658, subdivision (a).

Appearances on appeal include appellants The Southland Corporation, appearing through its counsel, Jeffrey A. Vinnick; Pardeep Pannu and Sukhsagar Pannu, appearing through their counsel, Rick A. Blake; and the Department of Alcoholic Beverage Control, appearing through its counsel, John W. Lewis.

¹The decision of the Department, dated September 21, 2000, is set forth in the appendix.

FACTS AND PROCEDURAL HISTORY

Appellants' off-sale beer and wine license was issued on October 25, 1990. Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage to a minor. Although not noted in the accusation, the minor was acting as a police decoy.

An administrative hearing was held on November 19, 1998, at which time oral and documentary evidence was received. Subsequent to the hearing, the Department issued its decision which determined that the sale had occurred as alleged in the accusation, and ordered appellants' license suspended for 25 days.

Appellants thereafter filed a timely appeal in which they contended, among other things, that the Department erred in its application of Department Rule 141(b)(2) (Title 4, Cal. Code Regs. §141(b)(2)).

The Appeals Board, in a decision dated January 6, 2000, reversed, stating that the decision of the Department was flawed because the Administrative Law Judge failed to make a finding with respect to Rule 141(b)(2). Citing Acapulco Restaurants, Inc. v. Alcoholic Beverage Control Appeals Board (1998) 67 Cal.App.2d 575 [79 Cal.Rptr.2d 126], the Board stated:

"If there is to be strict adherence to rule 141, as mandated by the court of appeal ... then, when the minor's appearance is at issue, the Department is obligated to make a finding as to that issue.

"We do not think it is consistent with the concept of strict adherence to assume simply because the ALJ finds in favor of the Department that he has found Rule 141 satisfied. We know from what the ALJ wrote that the decoy's accomplishments were impressive enough for him to record them in his opinion. What we do not know is whether he believed the decoy presented the appearance of a person under the age of 21. It can truly be said that he is the only person who knows what he believed, and he has not told us.

“The Board is not the finder of fact, and it is not its prerogative to make its own findings when those of the Department are deficient. While we have viewed the photograph of the minor, and have our own views as to what it tells us, our views are irrelevant. That is why we believe the case must be returned to the Department so that the critical 141(b)(2) findings can be made.”

Accordingly, the Board reversed the decision of the Department and remanded the case to the Department for reconsideration of the issue whether the decoy presented the appearance which could generally be expected of a person under 21 years of age. Following the Board’s remand, the Department, in its Decision Following Appeals Board Decision, dated June 7, 2000, ordered the case remanded to Administrative Law Judge Lo “for decision and clarification as he deems appropriate including the submission of any further evidence he may require in his exclusive discretion.”

Thereafter, Administrative Law Judge Lo issued his proposed decision after remand, which the Department adopted on September 21, 2000. In that decision, Administrative Law Judge Lo reaffirmed his original determination that appellants had violated Business and Professions Code §25658, subdivision (a), and expanded upon his reference to the appearance of the decoy, finding as follows:

“On March 21, 1998, the decoy was 5'11" tall and weighed approximately 145 pounds. He wore a baseball cap. A photograph of the decoy taken that day shows that he did display the physical appearance which could generally be expected of a person under twenty-one years old. (Finding of Fact IV.)

“The decoy had been an explorer with the Los Angeles Police Department for approximately five years. In that capacity, the decoy assisted the police department in tasks such as crowd control, directing traffic and general errands. In January 1998, he attained the rank of captain, the highest rank in the program. The decoy supervised 42 other explorers. (Finding of Fact V-A.)

“At the hearing, the decoy did not display the mannerism or demeanor which one would normally expect from a person who has such experience and

responsibility. His voice was soft, and not assertive. He sat slouched on the witness chair (perhaps due in part to his lankiness). And, he seldom looked his questioners in the eye. In other words, without the decoy's testimony regarding his rank and duties as an explorer, one would not know from the decoy's non-physical appearance that he held a position which required a substantial amount of maturity and experience. (Finding of Fact V-B.)

"The decoy's voice and manner of speaking at the hearing were the same as they were at Respondents' store. The decoy was not nervous at respondent's store, and he did not appear nervous while testifying. (Finding of Fact V-C.)

"The Administrative Law Judge observed the decoy's maturity, mannerism, poise and demeanor while he testified, and finds that the decoy had the non-physical appearance which could generally be expected of a person under twenty-one years old. Since the decoy's voice and manner of speaking were the same at the hearing and at Respondents' store, and he was not nervous at both locations, it follows that the decoy also had the non-physical appearance which could generally be expected of a person under twenty-one years old under the actual circumstances presented to Respondents' clerk at the time of the sale of the beer." (Finding of Fact V-D.)

DISCUSSION

Appellant's principal contention appears to be that an ALJ could not possibly conduct a full and fair analysis of the apparent age of a decoy after the passage of such a considerable length of time, in this case, some two years and nine months.

As we have said on other occasions, Rule 141(b)(2) requires an ALJ to make a subjective judgment, on the evidence presented, whether the decoy displayed the appearance which could generally be expected of a person under the age of 21. In our initial decision in this case, we acknowledged that for the Board to be assured that such a decision was not made arbitrarily, there be a showing that the ALJ applied the standard set forth in the rule, and not a truncated standard which failed to take into account indicia of age other than mere physical appearance.

This Board ordered a remand to the ALJ, because it believed such action

consonant with the Board's earlier view, expressed in Circle K Stores, Inc. (1999)

AB-7080a, that the Department was not barred from reconsidering the matter

following the Board's unqualified reversal of the Department's original decision.

Nonetheless, as in that case, the Board continued to entertain the doubts it

originally expressed:

"Even though we may entertain doubts as to whether the Department can rectify the defects in its earlier decision, in part as a result of the passage of time, those doubts are not so conclusive as to persuade us that the Department's order providing the ALJ an opportunity to do so was not within its jurisdiction."

With the benefit of hindsight, it is apparent to this Board that the manner in which this case was resolved offends our sense of fairness.

We did not expect the Department, and more particularly the ALJ, to simply declare, without further hearing and input from the parties, that he had in fact done exactly what the Board had said should have been done, even though there is no hint in his original decision that he had done so.

The Board, it can be said, envisaged something more, where the parties could have addressed the various indicia of age displayed by the decoy, and the weight to be accorded them. This did not happen.

In his original decision, the ALJ noted only that the decoy was 5' 11" tall, weighed approximately 145 pounds, had attained the rank of captain in the Los Angeles Police Department Explorers program, supervised 42 other explorers, and was not nervous when he purchased the beer. Upon remand, and, so far as the record reveals, without any further hearing or input from the parties, he made findings addressing the indicia of age the Board had said were examples of what should have been considered

in light of 141(b)(2).

While we do not question the ALJ's good faith, we do feel that there are enough questions about his ability to isolate, from memory, from all the decoys he has seen before and since these cases were heard, this particular decoy, that the procedure which was utilized was flawed and inherently unfair.

Now even more time has elapsed. We think it is time for the Department to recognize that this has become a case in which, as a result of a procedural error early on, no fair result is ever likely to be attained. While we may lack the ability to compel a dismissal, we do believe the Department, in an appropriate exercise of its discretion, should dismiss the accusation in this matter.

ORDER

The decision of the Department is reversed and the matter is remanded to the Department for such further proceedings as may be appropriate in light of the Board's comments.²

TED HUNT, CHAIRMAN
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

² This final decision is filed in accordance with Business and Professions Code §23088 and shall become effective 30 days following the date of the filing of this final decision as provided by §23090.7 of said code.

Any party may, before this final decision becomes effective, apply to the appropriate district court of appeal, or the California Supreme Court, for a writ of review of this final decision in accordance with Business and Professions Code §23090 et seq.